

APPENDICES

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Order Dated July 1, 1970

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-70 1276 RPP

KIRBY J. HENSLEY,

Petitioner,

v.

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT,
SANTA CLARA COUNTY, STATE OF CALIFORNIA,

Respondents.

Petitioner, convicted of a misdemeanor in the state court and presently out on O.R. (own recognizance), brings an action in habeas corpus challenging the constitutionality of the state conviction.

The petition must be denied, because this court does not have jurisdiction over the matter. 28 U.S.C. §2241(c)(3) provides that the writ of habeas corpus shall not extend to a prisoner unless he is "in custody" in violation of the laws of the United States.

The law of this circuit is clear that one who is out on bail is not "in custody" for either habeas corpus or 28 U.S.C. §2255 purposes. *Matyssek v. U.S.*, 339 F.2d 389, 392-93 (9th Cir. 1964). A fortiori, a person out on O.R. would not be in custody either.

The petition for habeas corpus is denied.

Is so ORDERED.

Dated: July 31, 1970.

/s/ ROBERT F. PECKHAM
United States District Judge

Order Dated July 1, 1970

Order Dated August 4, 1970

(Caption omitted)

Petitioner's motion for reconsideration of his habeas corpus petition is denied.

However, petitioner is granted a certificate of probable cause so that he may test this court's reliance on *Matyeek v. United States*, 339 F.2d 389, 392-93 (9th Cir. 1964) in the Court of Appeals for the Ninth Circuit.

Certificate of probable cause granted.

Is so ORDERED.

August 4, 1970.

/s/ ROBERT F. PROCKHAM

United States District Judge

Robert F. Prockham
United States District Judge

**Opinion of United States Court of Appeals
for the Ninth Circuit**

(Caption omitted)

[January 19, 1972]

**Appeal from the United States District Court
for the Northern District of California**

**Before: KOBUSCH and CARTER, Circuit Judges, and
SMITH,* District Judge.**

PER CURIAM:

The sole question on appeal is whether or not a person released on his own recognizance following trial, conviction and sentence on a state criminal charge is within the purview of 28 U.S.C. §2241, which extends the remedy of habeas corpus to persons "in custody" in violation of the federal constitution.¹ We conclude that he is not.²

Not long ago, this court squarely ruled on this question in *Matyssek v. United States*, 339 F.2d 389 (1964), cert. denied 361 U.S. 917. We held that a person released on bail was

* Honorable Russell E. Smith, United States District Judge, Missoula, Montana, sitting by designation.

¹ Hensley has been at liberty on recognizance at all times since conviction. Initially the state court stayed execution of sentence. At the exhaustion of Hensley's state remedies the district court issued a stay of execution pending habeas proceedings therein. Both the district court and this court denied a stay of execution pending this appeal. Subsequently, the Circuit Justice granted the stay.

² We are unable to treat this petition as one seeking coram nobis relief because Hensley seeks to challenge a state court proceeding in federal court. Coram nobis lies only to challenge errors occurring in the same court. 7 Moore's Federal Practice ¶80.14, p. 46.

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not "in custody," actual or constructive, so as to satisfy 28 U.S.C. §2241.¹

Appellant Hensley urges that *Matyssek* has been implicitly overruled by the recent Supreme Court cases of *Walker v. Wainwright*, 390 U.S. 335 (1968); *Peyton v. Rowe*, 391 U.S. 54 (1968) and *Carafas v. LaVallee*, 391 U.S. 234 (1968). These cases are distinguishable because in each of them there existed actual or constructive custody. In *Walker* and *Rowe*, the petitioners were in actual custody and in *Carafas*, the petitioner was on parole. In *Matyssek*, this court, while recognizing that release on parole constituted constructive custody, distinguished a bail situation holding that the attendant restrictions did not constitute custody. The Supreme Court has not, to this date, considered the express question posed herein.

We feel, therefore, constrained to follow *Matyssek v. United States*, *supra*.

Affirmed.

¹ The decisional rule is different in several other circuits. *Capler v. Greenville*, 422 F.2d 299 (5th Cir. 1970); *Burris v. Ryan*, 397 F.2d 553 (7th Cir. 1968); *Ouletta v. Sarver*, 428 F.2d 804 (8th Cir. 1970).

**Order Denying Petition for Rehearing and Rejecting
Suggestion for Rehearing *In Banc***

(Caption omitted)

**Before: KOELSCH and CARTER, Circuit Judges, and
*SMITH, District Judge**

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

M. OLIVER KOELSCH
United States District Judge

* Honorable Russell E. Smith, United States District Judge, Missoula, Montana, sitting by designation.